




How Informant Testimony Can Get Your Case Reversed

Be aware of the ethical and legal minefield involved when using informants.



Why is this a topic of discussion today?

The simple answer is that study after study about wrongful convictions identifies informant testimony as a significant contributor.

- Informant
- Jailhouse informant
- Accomplice informant
- Paid informant



DEFINITIONS



INFORMANT

Any person who knowingly provides information to law enforcement related to another's criminal activity, whose motivations for doing so are other than that of an uninvolved witness, victim, or private citizen primarily acting through a sense of civic responsibility and who, as a general rule, but not necessarily, expects some form of benefit or advantage for himself, herself, or another person in return.



JAILHOUSE INFORMANT

An inmate in custody who provides information or testifies about matters another inmate told him while both were in custody.



ACCOMPLICE INFORMANT

An informant who has a pending criminal matter and provides information about one or more co-defendants in return for a benefit or consideration in the pending matter.

LAW ENFORCEMENT INFORMANT

An individual who receives a benefit from law enforcement in return for information regarding criminal activity.

BENEFIT

Includes any consideration or advantage an informant was offered, promised, or received in exchange for information or testimony provided. It includes a benefit for the informant or another person at the informant's request. Common forms of benefits include, but are not limited to, the following: Financial, release from custody, charging leniency, delay, disposition, immunity, or favorable intervention.

THE *BRADY* RULE

The prosecuting attorney has a duty to disclose to the defendant all material evidence that is favorable to the finding of guilt or mitigating the defendant's sentence and that is possessed **by the prosecution team**. The team includes both investigators and prosecutorial personnel, including the entire prosecutor's office and all law enforcement and assisting agencies. This information must be disclosed whether it is requested or not.

MATERIAL (BRADY)

Evidence that is material to the case and favorable to the defendant. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Report of the 1989-1990 Los Angeles County Grand Jury

Investigation on Jailhouse Informants in the Criminal Justice System in Los Angeles County

What led to the Grand Jury Investigation?



In October of 1988, a jailhouse informant, Leslie White, demonstrated how one could obtain confidential information and then fabricate confessions of fellow prisoners without ever speaking to the targeted inmate.



After further public disclosures and appeals for an independent investigation through the media, a Grand Jury Investigation into the jailhouse informants matter was requested and a Special Counsel was formally appointed by the Attorney General in 1989.

Purpose of Grand Jury Investigation



- Conduct an overall inquiry
- Recommend policies and procedures



- 120 witnesses testified under oath before the Grand Jury
- 147 exhibits were introduced into evidence
- Interviews of additional people by the Special Counsel
- Thousands of pages of documents


What was included in the Investigation?



Recommendations:


1. Maintain a central file
2. Maintain a complete record
3. No consideration outside of written statement
4. Increased consideration of perjury charges
5. Regular training

1. Central File



Maintain a central file containing all relevant information regarding the informant, including the number of times the informant has testified or offered information and all benefits obtained.

2. Complete Record



Maintain a complete record describing all favorable actions taken on behalf of an informant, including copies of all relevant letters written.

3. Written Statement of Consideration



No consideration should be provided to the informant beyond what is listed in the required written statement of consideration, except as authorized the court.

4. Increased Consideration



The DA should give increased consideration to the prosecution of perjury and other crimes related to the conduct of informants.

5. Regular Training



The DA should conduct regular training of its professional staff regarding the specific ethical responsibilities of prosecutors.



6TH AMENDMENT CASES



Massiah v. United States (SCOTUS 1964)

- An informant working for law enforcement violates the defendant's 6th amendment right to counsel by **deliberately eliciting** statements from the defendant without the presence of counsel.
- Right to counsel at least attaches from the time of arraignment through trial.
- Statements obtained cannot be used by prosecution, case **reversed!**

6th AMENDMENT CASES



United States v. Henry (SCOTUS 1980)

- This case is about what kind of conduct will be considered "**deliberately eliciting statements**" from the defendant without the presence of counsel.
- FBI told jailhouse informant not to elicit any statements about the robbery. However, the court found that the informant did have "some conversations" with Henry and the incriminating statements were the "product of this conversation". Not merely listening.
- "If the Sixth Amendment is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."
- Statements obtained cannot be used by prosecution, case **reversed!**

6th AMENDMENT CASES



United States v. Moulton (SCOTUS 1985)

- When defendant calls the police informant to discuss the case and the informant elicits statements from defendant, the State is still **"deliberately eliciting statements"** from the defendant without the presence of counsel
- Government argued that it was Moulton who called to discuss case, not the informant.
- Ok to investigate threats (other crimes), but statements related to the charges where the right to counsel had attached are constitutionally barred from trial.
- Statements obtained cannot be used by prosecution, case **reversed!**

6th AMENDMENT CASES



Kuhlmann v. Wilson (SCOTUS 1986)

- A jailhouse informant who **merely listens** does not "deliberately elicit statements" from the defendant without the presence of counsel.
- Informant was hired **before** defendant was placed in his cell and instructed not to ask questions about the crime, but to keep his ears open regarding the crime and unknown accomplices.
- Court hearing likely necessary to determine if deliberately elicits or merely listening.
- Statements obtained can be used by prosecution!

6th AMENDMENT CASES



Fellers v. United States (SCOTUS 2004)

- Case is about when the 6th Amendment Right to Counsel attaches.
- The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

6th AMENDMENT CASES



State v. Martinez (AZ COA 2009)

- What if the informant wasn't a police informant at the time he deliberately elicited the statements?
- Police may not use a paid informant prisoner to surreptitiously elicit incriminating information once the right to counsel has attached.
- Whether a private person acted as a state agent is a fact intensive inquiry guided by common law agency principles (this should be litigated)

6th AMENDMENT CASES



State v Hall (Arizona 2003)

- The defendant was in jail after his May 17 arrest for assault on the police officers. While in jail he talked with L.C., another detainee in the same housing block.
- On July 22, Defendant was released on his own recognizance.
- Defendant was out of jail from July 22, 1997, through August of that year, but was arrested again on August 31 in connection with the aggravated assault charge and returned to Madison Street Jail.



State v Hall (Arizona 2003)

- In July 1997, the police were contacted by L.C., an inmate who was incarcerated with Hall at Madison Street Jail.
- During a series of interviews between July 29 and October 1, 1997, L.C. reported that Defendant told him he had kidnapped, robbed, beaten, and killed Lindberry. Defendant also reportedly told L.C. that after killing Lindberry, he and Mileham had wrapped the body in sheets and dumped it in the desert somewhere between Phoenix and New Mexico. At that point, Lindberry's body has not been recovered.



State v Hall (Arizona 2003)

- L.C. testified that during the July 29 and 31 interviews he provided most of the information he had learned from Defendant, but after Defendant was re-arrested in August he learned specific details of how the victim was beaten, that a key broke off in Lindberry's door, and that Lindberry's credit card was used at a hotel.



State v Hall (Arizona 2003)

- Some of L.C.'s later conversations with Defendant took place while both were allegedly drunk from prison hooch. L.C. stated that, while Defendant initiated the conversation, he encouraged it and did not act at the direction of the police, who had told him that he could not serve as a police agent.
- In November, 1997, in exchange for L.C.'s testimony the State dismissed an allegation of a prior conviction.



State v Hall (Arizona 2003)

- On September 2, 1999 the trial court reversed its previous ruling and held that admitting into evidence Defendant's conversations to L.C. occurring after August 31, 1997, did not violate Defendant's Fifth Amendment rights.
- The court found that, as in *Perkins*, "admission into evidence of jailhouse admissions made by an uncharged defendant to [an informant] did not violate his applicable Fifth Amendment *Miranda* rights."

5th AMENDMENT



DEPARTMENT OF CORRECTIONS
ARIZONA
JUL 20 2003

State v Hall (Arizona 2003)

- The trial court also found that, at the time of Defendant's incarceration for the assault, his Sixth Amendment right to counsel was not violated because Defendant had not been charged with any crimes relating to the disappearance of Ted Lindberry and therefore Defendant's Sixth Amendment right to counsel had not attached.

6th AMENDMENT



DEPARTMENT OF CORRECTIONS
ARIZONA
JUL 20 2003

State v Hall (Arizona 2003)

- However, the case was overturned and a new trial was required, as a result of bailiff's improperly giving extrinsic information to several jurors that defendant had bracelet-shaped tattoos on his wrists.
- In 2001 while the case was pending appeal, Lindberry's remains were discovered with an intact skull and in a different location than what the informant testified to.

Aftermath



DEPARTMENT OF CORRECTIONS
ARIZONA
JUL 20 2003

State v Hall (Arizona 2003)

- The informant had since died and the judge refused to allow his testimony because it was proved to be false and as sanction for not disclosing the discovery of the remains, the judge agreed to allow the defense to inform the jury of the lapse.
- Prosecutor's allowed Hall to plead to second-degree murder and a prison sentence of 16 years; he had already served more than 13.
- This case was used as support the amendment of the Arizona Rules of Professional Conduct Rule 3.8 Special Responsibilities of a Prosecutor, which now provides ethical guidance to prosecutors in situations in which an innocent person may have been convicted.


Aftermath




Judge Trott's #1 Rule regarding criminal testimony:

1. Criminals are likely to say and do almost anything to get what they want, especially if what they want is to get out of trouble with the law.

CRIMINAL INFORMANT TESTIMONY PERILOUS




Judge Trott Rule #1



Rule #1 – Criminal witnesses will say anything

- A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system,” and we indicated that “we expect **prosecutors and investigators** to take all reasonable measures to safeguard the system against treachery.” *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir.1993).

CRIMINAL INFORMANT TESTIMONY PERILOUS




Rule #1 – Criminal witnesses will say anything

- The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with **DUE PROCESS** of law as defined by our Constitution.
- This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to **turn a blind eye** to the manifest potential for malevolent disinformation.

CRIMINAL INFORMANT TESTIMONY PERILOUS



Informant Gets 6 to 12 Years for Perjury



Rule #1 – Criminal witnesses will say anything

Due Process under the 14th Amendment may be violated with the introduction of false testimony:

- through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is inconsistent with the rudimentary demands of justice.... And the action of prosecuting officers on behalf of the state ... may constitute state action within the purview of the Fourteenth Amendment.

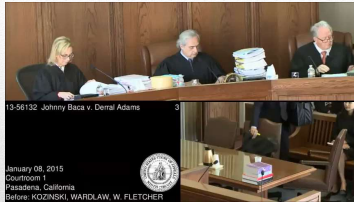
Mooney v. Holohan, 294 U.S. 103, 104, 55 S.Ct. 340, 79 L.Ed. 791 (1935)

CRIMINAL INFORMANT TESTIMONY PERILOUS

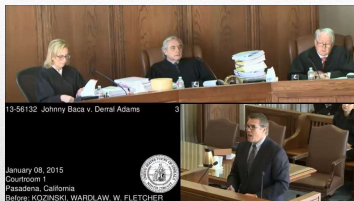
RIVERSIDE COUNTY: Prosecutor accused of lying in murder trial




- In 1995, John Adair and John Mix, a gay couple in Riverside County, were murdered in their home. The prosecutor relied on testimony of a jailhouse informant, who was facing his own charges for murdering a man with the help of an accomplice, to prosecute Johnny Baca.
- In Baca's trial, the informant was asked directly by the defense if he was receiving any favors from the prosecution in exchange for his testimony and he said no.
- The prosecutor then called his colleague, Spira, who was in charge of prosecuting the informant, to testify. Spira concealed the fact that several months before Baca's trial that the sentencing Judge had taken into account informant's testimony in Baca's case when determining his final sentence. In fact, Spira had said that the extra sentence reduction was due to a change in sentencing law in the informant's favor.



Allegation that the Prosecution Presented False Testimony



**Either way you don't want to have to
defend whether false testimony was
intentional or not?**



Rule #1 – Criminal witnesses will say anything


“A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, *the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.*”

• *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

CRIMINAL INFORMANT TESTIMONY PERILOUS

Informant Andrew Chambers






Rule #1 – Criminal witnesses will say anything

- Where the prosecution knew or should have known of the perjury, the conviction must be set aside “ ‘if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.’ *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)
- Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is “virtually automatic.” *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)

CRIMINAL INFORMANT TESTIMONY PERILOUS



Rule #1 – Criminal witnesses will say anything

- Where the **government was unaware of a witness' perjury**, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Sanders*, 863 F.2d at 226; see also *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir.1975)
- The test "is whether there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction."


CRIMINAL INFORMANT TESTIMONY PERILOUS



Judge Trott's #2 Rule regarding criminal testimony:

- Ordinary decent people are predisposed to **dislike, distrust, and frequently despise criminals who "sell out" and become prosecution witnesses**. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such "scum."

CRIMINAL INFORMANT TESTIMONY PERILOUS



Judge Trott's #2 Rule regarding criminal testimony:

- Criminal witnesses usually have a checkered past, felony convictions and other issues that tend to weaken their credibility
- Testimony is bought (whatever the deal is it must be disclosed) and if the criminal witness got too good of a deal, it further weakens their credibility
- If your witnesses is a bigger fish or more of a criminal than the defendant – not good
- Whistleblower versus snitch

CRIMINAL INFORMANT TESTIMONY PERILOUS



Recording that Undid the Chandra Levy Case






CRIMINAL INFORMANT TESTIMONY PERILOUS

Judge Trott's #2 Rule regarding criminal testimony:

1. Criminal witnesses usually have a checkered past, felony convictions and other issues that tend to weaken their credibility
 - a) Does the informant have copies of the target's police reports?
 - b) Has the informant been housed with the target or co-defendant?
 - c) Has the informant been transported to court with the target?
 - d) Is the informant in a rival gang to the target?
 - e) Was there bad-blood between the two before being incarcerated?
 - f) Was the informant and informant before?

"Skid Row Stabber" Gets Calif. Conviction Overturned After 30 Years In Prison



- Bobby Joe Maxwell, believed to be the Los Angeles "Skid Row Stabber" who killed homeless men in the 1970s, had his conviction overturned after a federal appeals court ruled the case against him was based on lies from a notorious jailhouse snitch, Sidney Storch.
- According to the court, Storch would often use articles to familiarize himself with details of a case, and then would claim to have heard confessions.
- He was later caught fabricating evidence and charged with perjury, but died in prison before he could be tried.



Judge Trott's #2 Rule regarding criminal testimony:

1. Criminal witnesses usually have a checkered past, felony convictions and other issues that tend to weaken their credibility
 - g. Mental problems / psychiatric disorders.
 - h. Probation reports
 - i. Prior police reports
 - j. Sentencing memoranda written in previous cases
 - k. Prison or jail files on informant
 - l. Drug addict?


CRIMINAL INFORMANT TESTIMONY PERILOUS



Judge Trott's #2 Rule regarding criminal testimony:


2. *Testimony is bought (whatever the deal is it must be disclosed) and if the criminal witness got too good of a deal, it further weakens their credibility*

CRIMINAL INFORMANT TESTIMONY PERILOUS



- Know your office's policies / guidelines regarding using informants.
- Have a very compelling reason to use an informant.
- Don't give up more than you need to.
- You must be in control!
- Never let your guard down -- Informants are NOT your friends


CRIMINAL INFORMANT TESTIMONY PERILOUS



Initial Contact with Informant

- Does informant have a lawyer?
- Require informant's lawyer to give you a detailed written proffer!
- Run this by a supervisor or experienced prosecutor not involved in any way in your case.
- Record all contact with informant.

CRIMINAL INFORMANT TESTIMONY PERILOUS



Initial Contact with Informant

- Don't ever tell the Informant at the end that he / she didn't uncover enough information to warrant a cooperation agreement.
- Watch your body language. Informants are often masterful at reading body language and if you aren't careful you will tip him / her off to information that is important to the case.
- Watch out for false testimony!

CRIMINAL INFORMANT TESTIMONY PERILOUS



The Agreement

- Must be in writing / and disclosed
- If the case goes to trial it may be an exhibit.

CRIMINAL INFORMANT TESTIMONY PERILOUS



The key to whether or not a jury will accept the testimony of a criminal is the extent to which the testimony is corroborated.

REQUIRE CORROBORATION!

Orange County Informant Scandal



Orange County Informant Scandal



Summary of OC Scandal



Though Scott Dekraai pled guilty to eight counts of first-degree murder, the prosecutor intended to use Dekraai's statements elicited by a jailhouse informant to help in the capital penalty-phase trial.

Jailhouse Informant Records



While preparing for trial, Dekraai's defense attorney, Sanders, noticed that Dekraai had confessed to the same jailhouse informant as one of his other clients. Upon receiving that informant's records ordered by the court, Sanders noticed that there were 9 cases in which he was an informant for. Another informant was also listed in Dekraai's records with notes suggesting his government handlers orchestrated contact between him and other detainees for the purpose of producing incriminating statements.



The informant's records also revealed that the amount of material prosecutors disclosed varied widely from case to case. In one case, just 4 pages of records related to this informant had been turned over; in another, approximately 200 pages had been released. The same was true for other cases where critical information had been withheld that would have either called into question the tactics that led to the confessions, undermined an informant's credibility, or even demonstrating the defendant's innocence.



Sanders filed motions arguing that the death penalty should be taken off the table, that Dekraai's statements were obtained in violation of the law and should be suppressed, and that the government's conduct was so corrupt that the OCDA should be recused from prosecuting the case.



Trial Court Ruling

2014 Ruling



Judge Goethals found that there had clearly been inexcusable discovery problems and questionable witness testimony, but there wasn't enough to suggest the case had been tainted by systemic corruption. As a sanction for the violations, he banned the prosecutor from using any of the statements made to the informant.



- Sanders uncovered new evidence that the Orange County Sheriff's Department documented and concealed its justification for moving jail inmates.
- The documents — known as TRED records — suggested in this case that Perez's placement next to Dekraai was intentional.
- The existence of the records also revealed that at least two witnesses lied at the 2014 hearing.

TRED Records Revealed after 2014 Ruling



2015 Supplemental Ruling

New Sanctions

- Recused OCDA and send case to AG's Office
- Limited evidence to only:
 - Evidence directly related to the defendant's conduct on October 12, 2011 in Seal Beach;
 - Statements the defendant made before he was booked into the Orange County jail; and
 - Victim impact evidence.



In light of the media attention, DA Rackauckas assembled a committee, called the Informant Policies & Practices Evaluation Committee. The committee consisted of independent lawyers and a retired judge to examine the OCDA policies and practices regarding the use of jailhouse informants.

Informant Policies & Practices Evaluation Committee

The committee conducted a 6 month evaluation and published a report on their scope of review, applicable law, evaluation process and methodology, and 10 recommendations.





Committee's Scope of Review

- Review was an evaluation and not an investigation.
- Did not have subpoena power.
- Limited to publicly available documents, including:
 - Legal briefs of cases involving confidential informants
 - Voluntary interviews with over 75 individuals
 - Internal OCDA training materials

Summary of Evaluation



The committee found a lack of strong leadership, oversight, supervision, and training.

Recommendations



1. Revise OCDA policies and procedures regarding the use of jailhouse informants.
2. Establish a Confidential Informant Review Committee (CIRC) with defined protocols and include an "outside" or independent member on the CIRC.
3. Overhaul the OCDA training program, with extensive additional training regarding discovery obligations and the use of jailhouse informants.
4. Coordinate with the OCSD and all law enforcement agencies in Orange County regarding jailhouse informant protocols and procedures, including OCDA's Jailhouse Informant Policy, and engage in detailed training on the Orange County Informant Index (OCII).
5. Restructure and combine into one unit the OCDA Gang Unit and Target Unit.
6. Establish an OCDA Conviction Integrity Unit.
7. Establish an OCDA Chief Ethics Officer position.
8. Reinstate the Chief Assistant District Attorney position.
9. Eliminate "Chief of Staff" position and create a position of "Assistant District Attorney for Media Relations."
10. Appoint an independent "monitor" for a three-year period to oversee OCDA compliance with the IPPEC's recommendation.

1. Revise OCDA Policies and Procedures



- ❖ Must have strong evidence corroborating the truthfulness of the jailhouse informant's statements
- ❖ Must be approved by the trial deputy's supervisor
- ❖ Then submitted in writing to and approved by the Confidential Informant Review Committee (CIRC)

1. Continued: The written request must include the following information



- Any benefit promised or given;
- Any prior offers to provide information, the quality of the testimony and any promises made or benefits provided to the informant;
- How contact was initiated between the informant and law enforcement;
- How the trial deputy intends to comply with the requirement to notify the victims of any crime alleged or committed by the informant before he or she is called to testify;
- A detailed description of the crime and the evidence;
- A draft of the written statement of consideration given or promised;
- Confirmation that the trial deputy has complied with the statutes;

1. Continued: The written request must include the following information



- The present status of the case of the offered testimony;
- Facts and circumstances surrounding the informant obtaining the defendant's admission/confession;
- The evidence/testimony offered by the informant;
- Evidence that corroborates the informant's proposed testimony and whether or not that information was available any way other than through the defendant;
- Strengths and weaknesses of the case with and without the testimony of the informant; and
- The informant's criminal background and past crime partners and co-defendants and any connection to the defendant in the present case.

1. Continued

- The Chair of the CIRC shall notify the requesting trial deputy of the committee's decision in writing.



1. Continued: Once an informant testifies, the trial deputy shall submit a memorandum.



The memorializing memorandum shall include:

- name of the jailhouse informant;
- case name;
- date of testimony;
- court case number;
- DR number;
- OCDA case number of the case the informant testified in;
- case numbers of the case(s) the informant received leniency/benefit;
- a synopsis of the informant's testimony and evaluation of its credibility; and
- any consideration provided or will be provided.

1. Continued

- Any information that suggests that a jailhouse informant is attempting to or has fabricated evidence shall immediately be reported to the Chair of the CIRC.
- Should the trial prosecutor learn during a trial that a jailhouse informant is attempting to or has fabricated evidence, the prosecutor shall immediately notify the court and defense counsel, and Chair of the CIRC.
- There is a duty to preserve all records and documents relating to any jailhouse informants.
- All prosecutors and investigators shall be familiar and comply with the statutes relating to jailhouse informants.



2. Establish a Confidential Informant Review Committee (CIRC)



Independent member should be appointed by the OCDA as a part-time employee of the OCDA's Office.

3. Overhaul the OCDA Training Program



- Comprehensive training program for newly hired attorneys
- Monthly weekend morning seminars
- Office-wide DNA training
- Domestic Violence Prosecution College
- Felony Prosecution and Sentencing College
- Homicide Prosecution College

3. Overhaul the OCDA Training Program



- Orange County Informant Index (OCII) Training
- Grand Jury College
- Specific Training Re Relationship and Interaction with Law Enforcement
- Brown Bag Lunch-Time Lectures
- OCDA Management/Leadership Training



- **Law Enforcement Training.** OCDA must have regularly scheduled training with all Orange County Law Enforcement Agencies. The training should include the following:
 - The prosecution team's discovery obligations;
 - Jailhouse informant statutory and case law;
 - OCDA's Jailhouse Informant Policy; and
 - OCII Protocol and Procedures.

4. Coordinate with the OCSD and all law enforcement agencies in Orange County

5. Restructure and combine into one unit the OCDA Gang Unit and Target Unit

IPPEC recommends combining the Gang and Target units to provide for greater collaboration on training and best practices.



6. Establish a Conviction Integrity Unit

- Reexamine post-conviction claims of innocence
- Investigate and evaluate claims of wrongful convictions
- Detect and remedy police and prosecutor mistakes earlier in the judicial process
- Ensure that those with information regarding improper investigations and prosecutions have a place to come forward with their claims



7. Chief Ethics Officer Position



- Experienced in criminal law with particular expertise in professional ethics and discovery obligations
- Work closely with the supervisor of the Training Unit to enhance the professional integrity of the OCDA
- Establish an internal mechanism for people to report possible ethics violations or improprieties by members of the OCDA's Office
- Authority to conduct investigations into internal ethical violations
- Make recommendations to the District Attorney regarding discipline for any ethical breaches

8. Chief Assistant District Attorney (CADA) Position



- Assist the District Attorney in the day-to-day management of the office
- Have a daily "hands on" approach with the head of the Training Unit
- Chair the Special Circumstance Committee and the CIRC in the District Attorney's absence and oversee the scheduling and paperwork flow for those committees
- Develop a protocol for the review of major cases
- Implement the Jailhouse Informant Policy recommended

9. Assistant District Attorney for Media Relations



The Chief of Staff position should be re-designated as the Assistant District Attorney for Media Relations, and be staffed with an Assistant District Attorney who will develop a transparent and professional relationship with the press.

10. Independent "monitor" to oversee compliance with recommendations



- To ensure that the IPPEC's recommendations are taken seriously
- Monitor should be a retired Judge
- Provide an annual report to the public reporting on the implementation and compliance

OCDA Acknowledgement in 2016

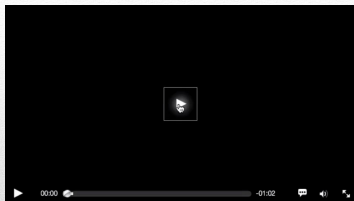


- Jail special handling deputies recruited and utilized numerous informers.
- Informants were kept in particular sectors and “in exchange for their information, informers were given favors by deputies such as phone calls and visits.”
- Maintain that that OCDA office had no prior knowledge of the logs and did not intentionally behave inappropriately.

U.S. Attorney General Investigates

U.S. Department of Justice officials have now launched an investigation, which was requested by the OC District Attorney after the committee presented its findings.





Political and Practical Fallout

Fourth District Court of Appeals (2016)



In the 53-page ruling, the appellate court strongly endorsed Judge Goethals' findings, saying the District Attorney's Office was too compromised by its loyalty to the Sheriff's Department.



Parents of slain North Dakota drug informant files wrongful death suit against cop who lured him into 'dangerous' deal

Rachel Hoffman Murdered



❖ Botched sting leads to Florida passing Rachel's Law.

Push for Reform



- At the state and federal level.
- Florida was successful in passing “Rachel’s Law.”




BRADY V. MARYLAND INFORMANT CASES



Brady v. Maryland

- The Supreme Court held that withholding exculpatory evidence violates due process “where the evidence is material either to guilt or to punishment.”
- Exculpatory evidence is “material” if “there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed.”
- Brady evidence includes statements of witnesses or physical evidence that conflicts with the prosecution’s witnesses, and evidence that could allow the defense to impeach the credibility of a prosecution witness.


BRADY V. MARYLAND INFORMANT CASES



Banks v. Dretke

- Government stated it had disclosed all *Brady* material but did not disclose that a key witness was a paid government informant.
- Defendant alleged the evidence that the State's witness was a paid informant would have been critical to the jury's assessment of his credibility.
- The United States Supreme Court held that any benefits received by a witness/informant falls under *Brady*, and that a witness's status as "paid informant" qualifies as evidence advantageous to defendant's ability to attack witness credibility.
- **It is a *Brady* violation for failing to disclose such status.**


BRADY V. MARYLAND INFORMANT CASES



Giglio V. United States

- A key witness against Petitioner testified at trial that he had not received a promise for leniency from the state in return for his testimony. Unbeknownst to the trial prosecutor, the witness had in fact received a promise for leniency from another prosecutor in the office.
- The U.S. Supreme Court held that the prosecution was obligated to disclose to the defense any promise or expectation of leniency it offered to a witness. It clarified that **the state's *Brady* obligation extends to all prosecutors in the office, and that it is up to such offices to create systems to ensure that such information is disclosed.**

BRADY V. MARYLAND INFORMANT CASES



Kyles v. Whitley

- SCOTUS imposed an affirmative duty on prosecutors to become aware of and disclose any favorable evidence held by others acting on the government's behalf, including the police.
 - Entire prosecution team – includes the jail
- A defendant is not required to show that had the withheld evidence been disclosed, more likely than not he would have been acquitted. It reiterated that instead, a defendant need only show that the undisclosed evidence "undermines confidence" in the trial outcome.
- **Inconsistent statements made by a police informant fall under *Brady*.**

BRADY V. MARYLAND INFORMANT CASES



Horton v. Mayle (9th Circuit)

- "where the prosecution fails to disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial."
- calling such lack of disclosure "unscrupulous."

BRADY V. MARYLAND AND INFORMANTS



Maxwell v. Roe (9th Circuit)

- Informant maintained at trial that his primary motivation for testifying was due to his "civic duty" and he denied any deal with the prosecution.
- The witness eventually conceded during cross examination that he had received a reduced sentence for his testimony.
- The 9th circuit held that it was a *Brady* violation where the prosecution failed to disclose details of informant's plea bargaining process, specifically the fact that the informant negotiated a separate deal with the prosecution that was more favorable than the deal negotiated by his lawyer.

BRADY V. MARYLAND AND INFORMANTS



Benn v. Lambert (9th Circuit)

- Informant was arrested on an outstanding warrant and called the prosecutor from jail to arrange a deal. He was released without being charged and subsequent charges were not filed.
- Informant's benefits conferred by the prosecution were withheld from defense.
- The court held that the *Brady* rule requires prosecutors to disclose any benefits that are given to a government informant including lenient treatment, and that a jury could have inferred that the informant had a motive to testify "other than altruism."

BRADY V. MARYLAND AND INFORMANTS




Robinson v. Mills (6th Circuit)

- Defendant was convicted of first degree murder. At trial, defendant testified that he had committed the murder in self-defense.
- The only evidence to the contrary was the testimony of the state's star witness, who was previously a paid confidential informant.
- The 6th Circuit held that suppression of a witness's status as a confidential informant is material under *Brady* because the status as an informant could cause a jury to question the witness's credibility.

BRADY V. MARYLAND AND INFORMANTS

Review: Informant Lessons from the Lincoln Lawyer

Why would he counsel his client not to talk about his case in jail?



One of the safest ways to use informant testimony.



When should a prosecutor tell the defense about a jailhouse witness?



Due diligence on informant's background



Judge Trott's Rule #2



Here's what can happen when you
don't do your due diligence.



It's all about the truth. Never
forget that.



Nobody wants this to happen on
their watch.



SUMMARY



1. "A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of the criminal justice system."

SUMMARY



2. Construe "benefit" broadly.

SUMMARY



3. Expect the courts to impute knowledge among all the prosecutors in your office. And to all law enforcement.

SUMMARY



4. Do a thorough background investigation of informants. Know what you are buying.

SUMMARY



5. Disclose everything.

SUMMARY



6. Make corroboration a prerequisite to using informant testimony.



How Informant Testimony Can Get Your Case Reversed

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